



FESI position on the Digital Services Act package

Brussels, May 2020

FESI, the **Federation of the European Sporting Goods Industry**, has followed with great interest the current discussions on the upcoming “Digital Services Act” (DSA) package and strongly welcomes the European Commission’s ambition to adopt “new and revised rules increasing and harmonising the responsibilities of online platforms, and to reinforce the oversight over platforms’ content policies in the EU”¹.

Ahead of the presentation of the European Commission’s proposal on the DSA, FESI would like to already draw the attention on **some key points that we think should be taken into consideration**:

1. Adopting **proactive and preventing measures to fight against illegal products online**
2. Simplifying and **harmonizing the notice and takedown procedures**
3. Introducing **new transparency and information requirements for online marketplaces**
4. Optimizing **use of technologies**
5. Strengthening **information sharing with right holders**

FESI represents some **1 800 sporting goods companies employing more than 700 000 people in Europe**. Our members’ focus is to offer innovative products and satisfy their consumers’ needs. While the development of e-commerce has been highly beneficial for the expansion of their operations, our brands are also **severely impacted by the presence and sale of illegal products online**², which has direct consequences on their businesses, employees, and consumers.

FESI believes that the upcoming “Digital Services Act” (DSA) represents a great opportunity to adopt a **clear, proportionate, and updated legal framework creating a safe and sustainable digital environment for consumers, brands, and online platforms**. Therefore, we strongly call the European Commission to update the current EU rules and propose a holistic approach to **tackle the sale and promotion of illegal content online, especially counterfeited products**. Other countries, in particular the United States, are also currently strengthening the measures to prevent the sale of illegal goods online³. Ahead of the presentation of the European Commission’s proposal on the DSA, FESI would like to already draw the attention on some key points that we think should be taken into consideration.

¹ https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_3.pdf

² “Illegal products” means any product which infringes intellectual property rights or criminal and/or civil legislation.

³ US Report on Combating Trafficking in Counterfeit and Pirated Goods; Executive Order on Ensuring Safe & Lawful E-Commerce for US Consumers, Businesses, Government, Supply and IP Rights; the Shop Safe Act 2020

1. Adopting proactive and preventing measures to fight against illegal products online

As rightly highlighted by the European Commission in its Strategy for “Shaping Europe’s Digital future”⁴, e-commerce and digital enterprises are steadily transforming our world. **The current e-Commerce Directive, which was adopted in 2000, is outdated and no longer fit for the new Digital age.** Online platforms are now playing a central role in all forms of electronic commerce. Marketplaces, social media and stand-alone websites are increasingly becoming an important source of income for criminal groups engaged in the sale of counterfeit products. In fact, **4,1 % of sales are lost in the sporting goods sector annually due to counterfeiting, which translates into € 300 million of revenue, 3 625 direct and indirect jobs losses, and €100 million in government revenue**⁵. In addition to the economic impact on legitimate businesses, counterfeiting also poses serious risks for the health and safety of European consumers, as well as for the environment.

Currently, the sporting goods industry believes that online platforms should play an increased role in proactively detecting and taking down illegal products. **FESI urges the EU Commission to clarify the role of online platforms and introduce both effective regulatory and self-regulatory measures to effectively tackle illegal goods online.**

A “Good Samaritan” provision encouraging online platforms to take proactive measures within the context of liability exemption is no longer sufficient. Online platforms need a clear role on the process to identify and ban bad actors and repeated offenders, acting together with right holders to effectively prevent counterfeits from entering the market. Therefore, **the e-Commerce Directive should include a “due diligence” principle**, under which platforms should act with diligence and implement any proactive and preventing measures in order to protect consumers and intellectual property right holders against the promotion, marketing and distribution of counterfeit products.

2. Simplifying and harmonizing the notice and takedown procedures

As highlighted by the European Commission in its Recommendation on measures to effectively tackle illegal content online⁶, there are increasing differences between the national rules related to notice and takedown procedures adopted by Member States. While speed is key to the efficiency of such procedures, **it should be made possible for rightsholders to request the takedown of several URLs simultaneously** (not notifications one by one). While it is also understandable that platforms avail of automated (standard) responses, such responses often result in multiple emails between platform and rightsholder and increases workload and response time. FESI believes it is essential that **more specific replies are being sent in case of (partial) refusal to remove the content.**

⁴ https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_3.pdf

⁵ Figures of the report reflect the presence of counterfeit goods in the EU marketplace (online and offline): https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/docs/2019_Status_Report_on_IPR_infringement/2019_Status_Report_on_IPR_infringement_en.pdf

⁶ <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online>

Regarding takedowns, the reaction time differs also a lot from a platform to another, from 12 hours to a month. **FESI believes that the term “expeditious” could be more strictly defined in the e-Commerce Directive as a short time period not exceeding 24 hours.**

3. Introducing new transparency and information requirements for online platforms

In addition to the information requirements enshrined in the e-Commerce Directive, **FESI believes that platforms should develop effective seller verification systems that include identity verification schemes.** It would be important in particular that online platforms link data of new sellers to accounts that were previously suspended or restricted, in order to **eliminate risk of repeat infringers returning** to the platform, or check active accounts, to prevent multiple (unjustified) accounts. In case of repeat infringers, platforms should re-verify the identity of the repeat infringer and monitor potential future counterfeit listings proactively, particularly if the same seller has been reported multiple times by one or more rights holders.

Online marketplaces play a key role in the dissemination of counterfeit products. According to a recent study⁷, 30% of consumers have inadvertently bought fake products online over the last five years and 26% of those purchased counterfeits were coming from online marketplaces. In such cases, only the online marketplace operator has the necessary information (e.g. information about the seller, information regarding the product, transaction history, contact details, etc.) to alert those of its users who have bought the product, and prevent damage. In that context, **FESI calls for the inclusion in the e-Commerce Directive of an obligation for any online marketplace operator** who has come to learn (through a notification from a right holder, or on its own) that a product on its platform is a counterfeit, **to inform consumers which have previously bought the corresponding product, that this product is a counterfeit** and that its use could cause harm.

4. Optimizing use of technologies

The e-Commerce Directive states that the provisions related to liability “should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology”⁸. The European Commission also highlights in its Recommendation⁹, that proactive measures taken by platforms could involve the use of automated means for the detection of illegal content. In fact, online platforms dispose of a wide range of technologies (e.g. algorithms, machine learning mechanisms and anti-fraud systems) which they use on a day-to-day basis to develop their business interests. **FESI invites platforms to be sharp and proactive and deploy such existing technologies to tackle illegal products, rogue sellers and repeat infringers.**

⁷ https://www.markmonitor.com/download/report/MarkMonitor_Online_Shopping_Barometer-q4-2018.pdf?cid=pr

⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=FR>

⁹ <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online>

5. Strengthening information sharing with right holders

To detect illegal goods, ban repeated offenders and break down supply chains, the **online platforms should be obliged to be transparent and share more data with law enforcement and rights holders** of listings that have been proactively and reactively removed in a timely manner, account information of sellers that have been suspended or banned from the platform and account information of repeat infringers. Sharing such information, especially with right holders, is essential in order to better fight together in a coordinated, effective, and sustainable way against the presence of illegal products online.

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About FESI

Founded in 1960 FESI - the Federation of the European Sporting Goods Industry represents the interests of approximately 1.800 sporting goods manufacturers (85% of the European market) through its National Sporting Goods Industry Federations and its directly affiliated member companies. 70-75% of FESI's membership is made up of Small and Medium Sized Enterprises. In total, the European Sporting Goods Industry employs over 700.000 EU citizens and has an annual turnover of some 81 billion euro.
